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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

Nos. 211-212

EASTERN BUILDING CORPORATION,
Petitioner,

vs.

THE UNITED STATES

PETITION FOR WRITS OF CERTIORARI TO THE COURT OF CLAIMS

HOMER CUMMINGS,
RAYMOND E. HACKETT,
Counsel for Petitioner.

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CITATIONS

Cases:

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PETITION FOR WRITS OF CERTIORARI TO THE COURT OF CLAIMS

The petitioner, Eastern Building Corporation, prays that writs of certiorari issue to review the judgments of the Court of Claims entered in the above-entitled causes on December 1, 1941.

OPINION BELOW

The opinion of the court below (R. 19, 22, and 25)[1] is not yet reported.

JURISDICTION

The judgments of the Court of Claims sought to be reviewed were entered December 1, 1941 (R. 11; No. 212, R. 13) and reentered on April 6, 1942 (R. 53; No. 212, R. 19).

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[1] Record references are to No. 211 except where otherwise indicated.

Motions for new trial were overruled April 6, 1942 (R. 12; No. 212, R. 13). The jurisdiction of this Court is invoked under Section 3(b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939.

QUESTION PRESENTED

Does a federal statute relating to Government contracts become, by implication, such a fixed term of a specific Government contract as to continue in effect after its outright repeal by Congress—particularly where (a) at the time of its repeal no rights had accrued and no action had been taken under such repealed statute, (b) there is involved no question of the impairment of vested rights, and (c) the repeal contains no proviso saving the operation of the repealed statute as to contracts entered prior to its repeal?

STATUTES INVOLVED

The Act of March 3, 1885, c. 342, 23 Stat. 386, provides that:

> A lease shall cease and terminate whenever a post office can be moved into a Government building.

The Act of June 19, 1922, c. 227, 42 Stat. 652, 656, provides in so far as here material:

> That that part of the Act approved March 3, 1885 (Twenty-third Statutes at Large, page 386), which provides that a lease for premises for use as a post office shall cease and terminate whenever a post office can be moved into a Government building, is hereby repealed.

STATEMENT

This is a petition for writs of certiorari to review the judgments of the Court of Claims entered in two successive suits brought to recover rents for different periods under

a lease to the United States. The pertinent facts in the two cases are substantially identical; they differ only in that they relate to rentals for different periods under the same lease. The amended special findings of fact of the Court of Claims (R. 14-18) may be summarized as follows:

Petitioner, a New York corporation, is the owner of certain real property located in New York City, on which is situated a building constructed in 1921 according to the Government's specifications and primarily adapted for post-office facilities. In March, 1922, petitioner leased that property to respondent for use as a post office for a period of twenty years from and after October 1, 1921, at an annual rental of $400,000 for the first year and $300,000 per annum thereafter.

The lease itself contained no provisions as to cancellation, except as to certain contingencies which did not arise and are not here material. Respondent entered into possession of the leased premises and continued to occupy them and pay rent therefor up to and including August 31, 1939. There the Post Office maintained what was known as the Varick Street Station.

On May 27, 1939, the Acting Postmaster General wrote petitioner asserting that the lease was cancellable upon three months' notice whenever it was found possible to remove all of the postal activities therefrom to a Government-owned building, and notifying petitioner that the Department elected to cancel the contract on that ground as of the close of business on August 31, 1939.

It is true that, at the date of the execution of the lease, there was in effect the Act of March 3, 1885, 23 Stat. 386, providing that "a lease shall cease and terminate whenever a post office can be moved into a Government build-

ing."[2] But on the date of the purported cancellation this provision had long been repealed by the Act of June 19, 1922, 42 Stat. 652, 656, which provided:

> That that part of the Act approved March 3, 1885 (Twenty-third Statutes at Large, page 386), which provides that a lease for premises for use as a post office shall cease and terminate whenever a post office can be moved into a Government building, is hereby repealed.

In response to a letter from the petitioner of June 2, 1939, the solicitor of the Post Office Department wrote petitioner on June 16, 1939, attempting to justify the cancellation under the provisions of the long-repealed Act. On August 31, 1939, petitioner again wrote the Postmaster General, protesting the cancellation. The respondent nevertheless vacated the premises on August 31, 1939, and the premises have since that date been vacant and unoccupied.

The respondent has paid the petitioner no rent since August 31, 1939, and the suits here involved were brought to recover rentals for the periods from September, 1939, to June, 1940, and from July to September, 1940, in the aggregate principal sum of $325,000.00. The Court of Claims gave judgment for the respondent in both suits. Chief Justice Whaley wrote an opinion in which Judge Jones concurred (R. 19-22). Judge Madden wrote a concurring opinion (R. 22-25). Judge Littleton wrote a dissenting opinion, in which Judge Whitaker concurred (R. 25-52).

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[2] At the time of the execution of the lease there was also pending before Congress proposals for the repeal of the cancellation provision in the Act of March 3, 1885; a special Joint Commission had been investigating the problem for a year and a half; Congressional leaders had given assurance that it would be repealed; and new leases were negotiated and executed by the Post Office in anticipation of the repeal. See Point II *infra*.

SPECIFICATION OF ERROR TO BE URGED

The Court of Claims erred in dismissing suits against the United States to recover rentals due under the twenty-year lease and in holding that the Post Office Department had the right to cancel the lease notwithstanding the prior repeal of the provision of the Act upon which the right of cancellation was solely predicated.

REASONS FOR GRANTING THE WRIT

The court below construed an unconditional and express repeal of a federal statute as not operative in cases involving contracts entered prior to such repeal. In other words, it held that a repealed statute remained operative in all cases arising under contracts made before its repeal. In so doing the court has decided an important federal question of statutory construction in disregard of settled rules of law and contrary to the applicable decisions of this Court. The question presented is of great and continuing importance in the interpretation of federal statutes, for at no time in the history of the United States has the law of public contracts and statutory construction been of greater consequence than it is today. Moreover, the decision below results in manifest injustice to petitioner, disregards the intention of Congress expressed in its unconditional repeal, ignores the legislative history, and disposes of the case in a manner contrary to the purposes of the legislative and executive officers at the time of the execution of the lease and repeal of the statutory right of cancellation here in issue.

I. The court below, relying upon a fiction to extend the life of the act of 1885 beyond its repeal, ignored the decisions of this Court.

In order to find continued validity in the repealed statute of 1885 which once authorized the cancellation of Post

Office leases, the court below was forced to breathe new life into the extinct statute. This it attempted to do upon the theory that that "statute was as much a part of the lease as if it had been written therein and formed a part of the contractual relations of the parties" (R. 20). It thus relied not upon the contract made by the parties but upon one which it created by legal fiction. Whatever may be the proper scope of this "obviously artificial * * * fiction upon a fiction",[3] this Court has never applied it to continue the life of repealed statutes.[4] Indeed, approaching the subject from several different directions, this Court has uniformly reached the contrary result; and it has warned that the familiar statement—that "laws which subsist at the time and place of the making of a contract * * * enter into and form a part of it"—is "broad language" which "cannot be taken without qualification" (*Home Bldg. & L. Assn.* v. *Blaisdell*, 290 U. S. 398, 430).

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[3] 3 Williston, Contracts (Rev. Ed.) p. 1768. Williston points out that "where different conclusions are reached by means of the fiction than would be reached without it, they are not preferable to the opposite ones." *Idem.* Undoubtedly the expression has come to mean different things, including the truism that an existing statute *governs* contracts. It may do no harm to say that such a statute governs "as if it had been written therein", but the question at bar relates to a situation where the once existing law is no longer law.

[4] This Court has used the expression in the following cases: *Rees* v. *City of Watertown*, 19 Wall. 107, 121; *Northern Pac. Ry.* v. *Wall*, 241 U. S. 87, 91-92; *Russell Co.* v. *United States*, 261 U. S. 514, 524; *Farmers Bank* v. *Fed. Reserve Bank*, 262 U. S. 649, 660, upon which latter case the court below solely relies; and *College Point Boat Co.* v. *United States*, 267 U. S. 12, 15, all involved merely the enforcement of laws existing at the time of contract and neither repealed nor modified. *Von Hoffman* v. *City of Quincy*, 4 Wall. 535, 550; *Edwards* v. *Kearzey*, 96 U. S. 595, 601; *Seibert* v. *Lewis*, 122 U. S. 284, 295; and *Walker* v. *Whitehead*, 16 Wall. 314, 317, all involved state legislation which interfered with *vested* rights under a prior contract (see Subpoint 2, *infra* in the text).

1.

An unqualified repeal, like any other unlimited change of law, has been uniformly regarded by this Court as in itself applicable in cases involving prior contracts.—Here, while the 1885 statute remained in effect, there was a technical or legal possibility that a federal building might some day be constructed into which the Varick Street Station of the New York Post Office might be moved and thus authorize the cancellation of the lease here involved. In 1922, before the statute was repealed, the possibility of cancellation of then existing Post Office leases was therefore predicated upon such a future contingency. In that year, however, the statute was repealed without qualifications, provisos, or a saving clause. Under such circumstances, the unconditional repeal has always been regarded by this Court as applicable in cases involving contracts made during the life of the repealed law.

The principle is well established that an unqualified repeal operates to eliminate the repealed statute from the law so as to prevent rights from accruing thereafter under the repealed statute. The leading case on the subject is *Kay* v. *Goodwin*, 6 Bing. 576, 583, 130 Eng. Repr. 1403, 1405 (1830) per Tindal, C. J.:

> I take the effect of repealing a statute to be, to obliterate it as completely from the records of the Parliament as if it had never passed; and, it must be considered as a law that never existed, except for the purpose of those actions which were commenced, prosecuted, and concluded whilst it was an existing law.

In *Ex Parte McCardle*, 7 Wall. 506, this Court said (p. 514):

> The general rule, supported by the best elementary writers, is that "when an act of the legislature is repealed, it must be considered, except as to transactions past and closed, as if it never existed."

In *Flannigan* v. *Sierra County*, 196 U. S. 553, this Court said (p. 560):

> The general rule is that powers derived wholly from a statute are extinguished by its repeal.

In the same case the Court (p. 561) includes with approval a quotation from Endlich on Interpretation of Statutes, sec. 480:

> If at the time the statute is repealed, the remedy has not been perfected or the right has not become vested, but still remains executory, they are gone.

In *Hertz* v. *Woodman*, 218 U. S. 205, this Court again recognized the same rule (p. 216):

> An unqualified repeal operates to destroy inchoate rights, as a release of imperfect obligations and as a remission of penalties and forfeitures dependent upon the destroyed statute.

These decisions, which the court below wholly ignored, conclusively demonstrate the departure from settled law embodied in the decision below.

Repeals, and indeed all types of changes in law, have been the subject of searching inquiry by this Court in connection with litigation arising upon prior contracts.[5] Thus, modifications of law, adopted without any special reference or saving clause as to prior contracts, have been held

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[5] There are, of course, both express and implied repeals, the latter involving the substitution of some new provision of law. As a matter of fact, changes of decisional or "common" law have in effect been regarded as repeals and have occasioned more serious controversy than changes in statute law. Compare: "A person has no property, no vested interest, in any rule of the common law. That is only one of the forms of municipal law, and is no more sacred than any other". *Munn* v. *Illinois*, 94 U. S. 113, 134; *Martin* v. *Pittsburgh & Lake Erie R. R. Co.*, 203 U. S. 284, 294; *The Lottawanna*, 21 Wall. 558, 577; *Western Union Telegraph Co.* v. *Commercial Milling Co.*, 218 U. S. 406, 417; *Second Employers' Liability Cases*, 223 U. S. 1, 50.

to apply in cases arising under prior contracts. The rule is illustrated in litigation involving legal tender legislation,[6] the Act to Regulate Commerce,[7] the antitrust laws,[8]

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[6] The first Legal Tender Act repealed and changed the law respecting legal tender, without any form of saving clause or reference to prior contracts. 12 Stat. 345. Yet this Court unanimously, despite differences of opinion on other questions, held it applicable to contracts entered prior thereto. *Hepburn* v. *Griswold*, 8 Wall. 603, 607, 608. (Mr. Justice Grier, who died before the decision was rendered, was the only justice who had held a contrary view as to the construction of the act. *Id.* at 626.) The Court held that "prior contracts are within the intention of the act" and that it "alters arbitrarily the terms" of such contracts. *Id.* at 608 and 609. *Hepburn* v. *Griswold* was later overruled on a constitutional question (*Legal Tender Cases*, 11 Wall. 682, 12 Wall. 457), but the point of statutory construction, holding the act applicable to "prior contracts," was necessarily assumed and reaffirmed in the long line of subsequent decisions. *Dooley* v. *Smith*, 13 Wall. 604; *Railroad Company* v. *Johnson*, 15 Wall. 195; *Maryland* v. *Railway Co.*, 22 Wall. 105; *Legal Tender Case*, 110 U. S. 421. Indeed, the point had been assumed in the decisions prior to *Hepburn* v. *Griswold*. See *Bronson* v. *Rodes*, 7 Wall. 229; *Butler* v. *Horwitz*, 7 Wall. 258.

[7] In *Louisville & Nashville R. R.* v. *Mottley*, 219 U. S. 467, this Court held that the Hepburn Act, which was entirely prospective in terms and made no reference to prior contracts, must be construed as applicable to pre-existing contracts. The Act changed the statutory law respecting railroad passes. *Id.* at 473, 475-478. It was thus an implied repeal of the law under which a contract respecting railroad passes had been made. There were no references or saving clauses respecting prior contracts, for it was passed "without making any exceptions *of existing contracts.*" *Id.* at 479. The Court held that the intention of the act was "to be gathered from the words of the act" (*Id.*, 474), that "the court cannot mold a statute simply to meet its views of justice in a particular case" (*Id.*, 474), that "the court cannot add an exception based on equitable grounds when Congress forebore to make such an exception" (*Id.*, 479), and that the contract was subject to the later statute (*Id.*, 482). See to the same effect *N. Y. Central R. R.* v. *Gray*, 239 U. S. 583. And, to the same effect respecting state statutes, see *Stephenson* v. *Binford*, 287 U. S. 251, 276; *Sproles* v. *Binford*, 286 U. S. 374, 390-391.

[8] The Sherman Act makes no reference, either by way of inclusion or exclusion, to prior contracts. 26 Stat. 209. Indeed, the statute speaks in terms of future contracts—"every person who shall make any contract" (Secs. 1 and 3). Yet the statute is uniformly held to apply to prior contracts. See the opinion of this Court in *United States* v. *Freight Association*, 166 U. S. 290, 342, rejecting the argument that the application of the act to prior contracts "is to give the statute a retroactive effect," and see the cases cited in *United States* v. *Southern Pac. Co.*, 259 U. S. 214, 234-235.

and federal employers' liability legislation.[9] An exhaustive discussion of additional types of contract cases is set forth in *Home Building & L. Assn.* v. *Blaisdell,* 290 U. S. 398, 429-441. As Mr. Justice Holmes has said, subsequent statutes are not defeated "by making a contract." *Hudson Water Co.* v. *McCarter,* 209 U. S. 349, 357. Everyday legislation leads to the "disappointment of expectations and even the frustration of contracts" (*Holyoke Power Co.* v. *Paper Co.,* 300 U. S. 324, 341). These decisions involve questions of both power of Congress and statutory interpretation; and they illustrate not merely the error of the court below in predicating decision upon the mere existence of a prior contract, but also emphasize the importance of the question, for Congress has come to rely upon the settled rule and the matter arises in almost every field of federal legislation.

It is established that, if a limited repeal only is intended by Congress, a saving clause must be included in the repealing act; and a repealing statute, without saving clause or reservation, is uniformly to be construed so that any statuory right, claim, defense, liability, right of action, penalty, or forfeiture under the repealed statute will be cut off and destroyed. This is so held because the unqualified use of the word "repealed" cannot be otherwise construed than as manifesting the legislative intent to extinguish and do away utterly with all rights under the abrogated statute. *United States* v. *Chambers,* 291 U. 217, 223; *Hallowell* v. *Commons,* 239 U. S. 506, 508; *United States* v. *Reisinger,* 128 U. S. 398, 401; *South Carolina* v. *Gaillard,* 101 U. S. 433, 438; *Railroad Co.* v. *Grant,* 98 U. S. 398, 402-403;

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[9] In *Philadelphia, Balt. & Wash. R. R.* v. *Schubert,* 224 U. S. 603, 613, the provisions of the Second Employers' Liability Act—though prospective in terms and without any reference to prior contracts—were held to apply to, and supersede the terms of, contracts made before the passage of the Act.

Assessors v. *Osbornes*, 9 Wall. 567, 575; *United States* v. *Carlisle*, 5 App. D. C. 138, 144. But the court below disregards these precedents.

This Court has frequently stated the rule that the application of repeals, or other modifications of law, to prior contracts does not depend upon any intent to be gathered beyond the words of the legislation itself. Yet the concurring judge below disregarded the express and unqualified form of the repealing statute on the ground that Congress would have inserted a saving clause as to prior contracts "if it had devoted its attention to the problem" (R. 24-25). No such speculative doctrine has ever been sanctioned by this Court, at least in the situation presented here;[10] and, as set forth below in Point II, Congress did give its attention to the problem—as did the officials of the Post Office Department—and determined upon an unlimited repeal without provisos or saving clauses. Moreover, as against prior contracts, the operative intention of a statute is "to be gathered from the words of the act"; a court "cannot mould a statute simply to meet its views of justice in a particular case"; and it is not the judicial function to "add an exception based on equitable grounds when Congress forebore to make such an exception". *Louisville & Nashville R. R.* v. *Mottley*, 219 U. S. 467, 474, 479. Where Congress has not limited a repeal, the courts "must presume that Congress meant the language employed should have its usual signification, and that the old law should be unconditionally repealed." *Railroad Co.* v. *Grant*, 98 U. S.

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[10] This Court has stated the contrary rule as a general proposition: "When terms are unambiguous we may not speculate on probabilities of intention." *Insurance Company* v. *Ritchie*, 5 Wall. 541, 545. "The intention of the Congress is to be sought for primarily in the language used, and where this expresses an intention reasonably intelligible and plain it must be accepted without modification by resort to construction or conjecture." *Thompson* v. *United States*, 246 U. S. 547, 551. "To supply omissions transcends judicial function." *Iselin* v. *United States*, 270 U. S. 245, 251.

398, 402-403. "If there be no saving [clause] in a statute, the court cannot add one." *Yturbide's Executors* v. *United States,* 22 How. 290, 293.

The error of the court below is further emphasized by the fact that there is a general statutory saving clause applicable to all repeals of federal statutes. 1 U. S. C. sec. 29. The operation of this general saving provision, however, is by its terms specifically limited to a "penalty, forfeiture, or liability" which has actually been "incurred" prior to repeal. In the case at bar, no penalty, forfeiture, or liability is involved, and nothing had been "incurred" prior to the repeal.[11] Accordingly, the court below has not merely supplied a saving clause, but has invented and applied a saving clause in addition to the more limited general saving provision in the light of which Congress acted and upon which alone Congress relied.

It is not the function of courts "to engraft on a statute additions which [they] think the legislature might or should have made." *United States* v. *Cooper Corporation,* 312 U. S. 600, 605. Contrary to general law and ignoring the specific and settled decisions of this Court, the court below has, at least, passed "unconsciously from the narrow confines of law into the more spacious domain of policy." *Phelps Dodge Corp.* v. *National Labor Relations Board,* 313 U. S. 177, 194. Morever, in so doing, it has upset the law of public contracts and statutory construction in a fundamental particular.

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[11] That the general saving clause of 1 U. S. C. 29 is not applicable here has been decided by this Court in *Brown* v. *Helvering,* 291 U. S. 193, 200: "No liability accrues * * * on account of cancellations which it is expected may occur in future years * * * Except as otherwise specifically provided by statute, a liability does not accrue as long as it remains contingent." See also the first group of cases cited *supra* in this point.

2.

The settled rule is that repeals, unlike general legislation, are intentionally and necessarily retroactive; and, even if the operation of the repeal here involved be retroactive because applied in a case involving a prior contract, there is no reason to deny the repealing act of Congress its normal effect.—Pursuing the fiction that the cancellation clause of the 1885 statute is to be regarded as written into the lease itself, the court below refused to honor the repeal on the ground that, to do so, would leave "the lease without any cancellation clause" and would amount to "retroactive" legislation requiring the application of special canons of construction. As has been said above, the court below did not rely upon the terms of the contract agreed upon by the parties but wrote into the contract a new term; and, as a second step, it is forced to go further and say that this fictitious "contract" provision cannot be changed without running afoul of rules respecting retroactive legislation. In so doing, it ignored fundamental and settled rules of law relating to statutes.

(a) The court below, in branding the repeal of the 1885 act as disfavored because "retroactive", cites cases involving ordinary legislation rather than repeals (R. 20-21).[12] But a repeal by its very nature is retroactive. The

[12] *United States* v. *Heth*, 3 Cranch 399, 413, confined the operation of a statute respecting customs collectors' fees to bonds for imports taken after the effective date of the statute. *United States* v. *Burr*, 159 U. S. 78, 82, 83, involved the application of new tariff rates to transactions theretofore completed. *Miller* v. *United States*, 294 U. S. 435, 439, involved an administrative regulation which was held both invalid and inapplicable to an insurance policy which had lapsed eleven years before. *Twenty Per Cent Cases*, 20 Wall. 179, 187, involved (a) vested rights (pp. 186, 187-188) previously accruing in the form of salaries due federal employees, (b) the repealing act by its terms applied only after a date long subsequent to the compensation involved (p. 180), and (c) the pay statute under which claim had been made had expired of its own terms before the alleged repeal (p. 186). *Chew Heong* v. *United States*, 112

rule disfavoring retroactive construction [13] has no application to repeals, which are governed by a contrary rule; [14] the two exist side by side, and are recognized in every standard work on statutory construction.[15] The necessarily retroactive effect of repeals, which the court below for the first time in the history of federal law rejects, is recognized without exception in state courts throughout the nation [16]

U. S. 536, 559, involved a statute requiring a certificate for the reentry of Chinese laborers, which was held inapplicable to a laborer who had temporarily left the country prior to the passage of the act. *Fullerton-Kreuger Co.* v. *Northern Pacific Ry. Co.*, 266 U. S. 435, 437, involved a statute of limitations, which was held inapplicable to causes barred before its passage.

[13] See, for example, Black, Interpretation of Laws (1911), sec. 117, p. 385.

[14] See, for example: "A repealing statute is generally to be construed retrospectively, in so much that any right or liability, right of action, penalty or forfeiture which depended wholly on the repealed statute and did not exist at common law, and which had not passed into judgment at the time of the repeal, will be cut off and destroyed by the repeal, unless saved by a clause in the repealing act applicable thereto, or by a general statute having the same effect." Black, Interpretation of Laws (1911), sec. 124, p. 421.

[15] Every treatise on the subject recognizes the two rules, the first against retrospective operation of statutes generally and the second, equally strong, recognizing the necessarily retrospective operation of repealing statutes. See, in addition to the quotations from Black cited in notes 13 and 14 *supra*, Sedgwick, Construction of Statutory and Constitutional Law (2d ed. 1874), pp. 161 note, 166 (General rule), pp. 108-111 (rule as to repeals); Endlich, Interpretation of Statutes (1888), sec. 271, p. 362 (general rule), secs. 478, 480, pp. 680, 684 (rule as to repeals); Lewis' Sutherland, Statutory Construction (2d ed. 1904) vol. 2, sec. 642 (general rule), vol. 1, sec. 282 (rule as to repeals); Maxwell, Interpretation of Statutes (7th ed. 1929) p. 186 (general rule) and pp. 342-343 (rule as to repeals); Craies, Statute Law (1929), p. 324 (general rule, p. 291 (rule as to repeals); Crawford, Statutory Construction (1940) sec. 277, pp. 562-563 (general rule), secs. 316 and 317, pp. 640-641, 645 (rule as to repeals).

[16] State courts treat the rule as to construction of repeal statutes either as an independent rule or as an exception to the general rule. In all instances, however, they hold that each rule is applicable only to statutes of the type that properly falls within its ambit. *Dillon* v. *Linder*, 36 Wis. 344, 349; *Rood* v. *Chicago, Milwaukee & St. Paul Ry. Co.*, 43 Wis. 146, 151, 153; *Pittsley* v. *David*, 298 Mass. 552, 11 N. E. 2d 461, 463-464 (1937); *Curtis* v. *Leavitt*, 15 N. Y. 9, 152-153; *Miller* v. *Chicago & N. W. R. Co.*,

and in the English-speaking world generally.[17] In *Butler* v. *Palmer*, 1 Hill (N. Y.) 324, dealing with a repeal of a law conferring a right of redemption, the court said (p. 333-335):

> A number of cases have been cited by the counsel for the defendant, and some are very strong ones, to show that any enactment of the legislature annulling contracts, or creating new exceptions and defenses, shall be so construed as not to affect contracts or rights of action existing at the time of the enactment. * * * But these are all cases relating to positive enactments. None of them arose on a repealing clause.

In *Curran* v. *Owens*, 15 W. Va. 208, the court held (p. 226):

> Intent cannot be expressed more clearly than by wholly repealing the statute that gives the right of action, without a saving clause as to rights accrued or pending actions. Numerous authorities have been cited by counsel for defendant in error, among them *Tenant* v. *Brookover*, 12 W. Va. 337, laying down the correct rule of law that "It is a sound rule of con-

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133 Wis. 183, 188; *White* v. *Clark*, 11 U. C. Q. B. 137, 141; *People* v. *Van Pelt*, 4 How, Pr. 36, 38-39; *Washburn* v. *Franklin*, 35 Barb. (N. Y.) 599, 600; *Musgrove, Aud'r.* v. *Vicksburg & N. R. R. Co.*, 50 Miss 677, 681; *Gordon* v. *State*, 4 Kan. 489, 500; *Leach* v. *Kenyon*, 146 Misc. 571, 261 N. Y. S. 676, 682 (1933); *Detroit Trust Co.* v. *Allinger*, 271 Mich. 600, 610; *Wall* v. *Chesapeake & Ohio Ry. Co.*, 290 Ill. 227, 232; *Parr* v. *Paynter*, 78 Ind. App. 639, 137 N. E. 70, 71; *Van Inwagen* v. *City of Chicago*, 61 Ill. 31, 34; *Merlo* v. *Coal and Mining Co.*, 258 Ill. 328, 333; *Wilmington Trust Co.* v. *United States*, 28 F. (2d) 205, 206. These citations are not exhaustive; they are given merely to show the universal recognition that the general rule against retroactive operation of statutes has no application where a direct and simple act of repeal is involved.

[17] In *Reynolds* v. *Attorney General for Nova Scotia*, [1896] A. C. 240, the Privy Council upheld the retroactive effect of a repealing statute which destroyed the statutory right of a mining licensee (who had paid for his license) to obtain a renewal for one year. The case is precisely applicable here, though there it was the private party who suffered because the statutory right to the renewal was lost by subsequent repeal. The same result was reached as to the repeal of a bounty due licensed sugar producers in *United States* v. *Carlisle*, 5 App. D. C. 138, 144.

> struction that a statute should have a prospective operation only, unless its terms show clearly a legislative intention that it should operate retrospectively." These authorities refer to positive enactments, and can have no application to this case.

In *Hazzard* v. *Alexander,* 173 A. (Del.) 517, the court quotes from *Cook* v. *Gray,* 2 Houst. (Del.) 455, 475 as follows (p. 521):

> Indeed, it would seem that the simple fact, of an absolute repeal of a former statute, without any express saving clause, is so inherently significant of an intent to do away, utterly, with everything which may have arisen under the abrogated statute, unless protected by the prohibitions of the federal constitution as to require the courts to give the repealing act a retroactive operation.

In *People* v. *Lindheimer,* 371 Ill. 367, the court held (pp. 375-376):

> Where the legislature passes a repealing act and nothing is substituted for the act that is repealed, the effect is to obliterate such statute as completely as if it had never been passed. * * * The holdings that such a repeal wipes out all remedies under the prior statute and leaves the parties where the repeal finds them, * * * necessarily makes the repealing act retrospective. The intent of the legislature that it should be so is manifest from the nature of the absolute repeal.

Unless, therefore, federal law is to diverge from the unbroken rule on this fundamental question, the action of the court below in devising a special rule of construction disfavoring the retroactive effect of repeals is wholly unwarranted.

(b) Moreover, as this Court has held, the operation of a repeal such as that here involved is not to be considered

as "retroactive" in any event even if applied to pre-existing contracts. True, had the specified contingency arisen and had the Post Office canceled its lease prior to the repeal of the 1885 statute, of course the subsequent repeal would not undo the executed cancellation. But that did not happen. The only contingency upon which the 1885 statute even could become operative in this case did not occur until seventeen years after its repeal; and the Post Office did not attempt to rely upon the 1885 statute, and cancel the lease, until seventeen years after the 1885 statute had been repealed. Hence, at the time of the repeal nothing had happened except that the parties had theretofore entered a contract.

But, in federal law, the mere execution of a contract does not freeze then existing law.[18] And rights which

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[18] In the third paragraph of Subpoint 1, *supra*, the statutory interpretation phase of unqualified modifications of law is discussed. But the type of case there cited involves questions of both statutory interpretation and power of Congress. Those precedents are even more generally cited on the point of legislative power; and, on the latter point, this Court, in contract cases, has time and again enunciated the rule: "There can, in the nature of things, be no vested right in an existing law which precludes its change or repeal." *Louisville & Nashville R. R.* v. *Mottley*, 219 U. S. 467, 484. "All such measures may, and must operate seriously upon existing contracts, and may not merely hinder, but relieve the parties to such contracts entirely from performance. • • • Contracts must be understood as made in reference to the possible exercise of the rightful authority of the government." *Legal Tender Cases*, 12 Wall. 457, 550, 551. "That which exists at the date of the execution of the mortgage does not become so embedded in the contract between the parties that it can not be constitutionally altered." *Gelfert* v. *National City Bank*, 313 U. S. 221, 231. "Utility rate contracts give way to this power as do contractual arrangements between landlords and tenants." *Veix* v. *Sixth Ward Bldg. & Loan Asso. of Newark*, 310 U. S. 32, 39-40. "The Government • • • by making a contract • • • does not give up its power to make a law". *Ellis* v. *United States*, 206 U. S. 246, 256. The lease was "entered into not only subject to statutes already in force, but to those which should thereafter be passed." *De Laval Company* v. *United States*, 284 U. S. 61, 73. Not only is there no special rule of construction in federal law where prior contracts are involved, but such contracts give way day by day to express or implied repeals and every form of legislative modification short of the impairment of fully vested rights.

are merely contingent, or which depend upon events subsequent both to the contract relied upon and the repealing or modifying legislation, may be cut off or altered without the subsequent legislation being even considered retroactive. As this Court has said, in the ordinary case involving private rights under contracts, Congress "cannot undo what has already been done, and it cannot unmake contracts that have already been made, *but it may provide for what shall be done* [*under those contracts*] *in the future.*" *Sinking Fund Cases*, 99 U. S. 700, 721 (emphasis supplied). "A statute is not rendered retroactive merely because the facts or requisites upon which its subsequent action depends, or some of them, are drawn from a time antecedent to the enactment." *Reynolds* v. *United States*, 292 U. S. 443, 448-449, the rule of which had previously been announced by the Court of Claims in *Johnston's Case*, 17 C. Cls. 157, 170-171. In applying a subsequent statute to cases involving prior contracts, "we give the law no retroactive effect. * * * There is nothing of an *ex post facto* character about the act." *United States* v. *Freight Association*, 166 U. S. 290, 342.

Thus the so-called "retroactive" effect of the repeal of the 1885 act in this case, which the court below purports to find and upon which it grounds its decision, has been denied by this Court. But the Court of Claims wholly ignores these decisions.

(c) Finally, the rule against retroactive construction of ordinary statutes is itself based upon the desire to avoid trespassing upon vested rights. Indeed, the concurring judge below rested decision entirely on precedents respecting vested rights (R. 23, 25).[19] But there can be no pos-

[19] The following cases are cited by the concurring judge: *Lynch* v. *United States*, 292 U. S. 571, invalidated an attempt to repudiate contractual obligations of the United States with reference to War Risk Insurance (pp.

sible doubt that Congress had plenary authority to do precisely what it did here, and hence there is no question of vested rights and no reason to construe away what it did. Here "no private right had vested, and the Government could abandon its own." *Ettor* v. *Tacoma*, 228 U. S. 148, 156-157. "Power to release or otherwise dispose of the rights * * * of the United States is lodged in the Congress by the Constitution. Art. 4, § 3, cl. 2." *Royal Indemnity Co.* v. *United States*, 313 U. S. 289, 294. There is not the slightest inhibition upon the waiver, abandonment, or release by Congress of statutory or even contractual rights of the United States.[20] "Certainly the power to do so is too well settled to admit of controversy. The repeal of the law * * * is of itself a remission." *State of Maryland* v. *Baltimore & Ohio Railroad Co.*, 3 How. 534, 552.

The court below thus refused to honor the Congressional repeal of the very source from which it purported to draw the cancellation clause. Even assuming that a cancellation clause may be written into a contract by operation of law,

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579-580) which were held to be vested rights (p. 577). *Knights Templars' Indemnity Co.* v. *Jarman*, 187 U. S. 197, similarly involved the impairment of an insurance contract by a state. *Duke Power Co.* v. *South Carolina Tax Commission*, 81 F. 2d 513 (C. C. A. 6), held that taxpayers had a vested right to moneys paid under protest so that the remedy by suit to recover could not be withdrawn (pp. 516-517).

The concurring judge also refers to a supposed rule of taxation that "the repeal of the old statute is never held to have the effect of preventing the government from collecting the taxes which fell due before the repeal" (R. 23), but there is a general saving clause which covers this situation (1 U. S. C. sec. 29; 1 Paul & Mertens, Law of Federal Income Taxation, sec. 3.26, p. 59).

[20] Thus Congress may waive an adjudication in favor of the United States (*Cherokee Nation* v. *United States*, 270 U. S. 476, 486), permit a law creating a forfeiture to expire (*Yeaton* v. *United States*, 5 Cranch 281), waive a valid defense of illegality in a suit upon a contract (*Theodore Adams's Case*, 2 C. Cls. 70), relieve individuals of debts owing the sovereign (*Reynolds* v. *United States*, 292 U. S. 443, 448), and release liabilities "at pleasure" (*Johnston's Case*, 17 C. Cls. 157, 171).

the court below assigns no reason why it was not here written out by the same token. If such a clause was written into the contract by the 1885 statute, by the exercise of the same legislative power it was expunged from the contract by the unqualified repeal of 1922.

II. The equities of the case weigh heavily in favor of the petitioner, and the decision below ignores the intention of the parties and of Congress.

What has been said above regarding the nature and effect of repealing acts, and the lack of authority in the courts to supply saving clauses which Congress has omitted, should make it clear that the so-called equities of the individual case are hardly pertinent. However, if material, the equities here will be found to weigh heavily in favor of the petitioner. The majority judges below lay stress on the fact that petitioner has not shown, by testimony, that the pending repeal of the 1885 act was relied upon by the lessor at the time the lease was executed (R. 21).[21] But, despite the absence of any such testimony—which was not offered because the case was not tried on that theory

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[21] The court below had previously decided a case, involving a similar lease and the same statutes, contrary to the decision subsequently announced in the case at bar. *Twin Cities Properties, Inc.* v. *United States,* 87 C. Cls. 531 and 90 C. Cls. 119. Without making any attempt to resolve the conflict in law between the two decisions on the nature and effect of repeals, two of the majority judges attempt to distinguish the cases on the ground that, in the former, testimony was adduced to the effect that the lessor there had anticipated and relied upon the then pending repeal (R. 21-22). The concurring judge does not mention the prior decision, but he also states that petitioner here offered no testimony to the effect that in making the lease the pending repeal of the 1885 act had been relied upon. That different results were reached upon the presence or absence of such self-serving testimony emphasizes the tenuous nature of the decision. Furthermore, while two of the majority judges assume that petitioner here did not rely upon the pending repeal in fixing the lease rental, the concurring judge admits that petitioner "probably" knew of it (R. 25).

and because such testimony would have been merely a self-serving conclusion in any event—other facts and circumstances not mentioned by the majority judges demonstrate that the pending repeal was taken into account by the parties and reflected in the agreed rent. Thus, rather than preventing an injustice to the United States, a gross injustice will be done petitioner if the repeal of the 1885 act is not allowed its normal effect in this case. As shown by the record and the legislative history of the statutes involved, all of which is cited and set forth at length in the dissenting opinion of two of the judges below (R. 33-40, 44-50), these facts are as follows:

In 1920 the Post Office Department was authorized to enter long-term leases (R. 33-34). The same statute provided for a Joint Commission of legislators and executives to investigate the postal system "and especially all methods and systems which relate to the handling, delivery and dispatching of the mails in the large cities of the United States" (R. 34-35). It held hearings during 1920, 1921, and the first months of 1922 (R. 35). In 1921 it recommended the repeal of the 1885 act giving the Post Office authority to cancel leases, because parties who constructed special buildings to lease to the Post Office for long terms were requiring increased rentals to cover the risks of possible cancellation under the 1885 act (R. 35-36). In January, 1922, testimony was given by the Postmaster General and others respecting the negotiation of leases in New York City and the necessity of a repeal of the 1885 act in order to secure reasonable rental contracts (R. 36-38). In this and subsequent hearings, as well as in a letter of the Postmaster General, the point was made that, *where the cancellation privilege was desired, it could be written into leases by the Post Office officials whether there was a statute or not* (R. 36-40). The chairman of the Joint Commis-

sion also announced that the 1885 statute "will be repealed" (R. 40).

All of these events occurred before the actual execution of the lease here involved. The negotiations for the lease here in question had been pending for a year and a half—during the whole period of these legislative and executive investigations and recommendations—prior to the actual execution of the lease in 1922 (R. 16-17). These negotiations involved a lease in New York City, to which the particular attention of Congress had been directed in its hearings on the proposals for the repeal of the 1885 act (R. 36-38). As stated above, it had been authoriatively announced that the 1885 act would be repealed (R. 40). The Postmaster General, referring to "the postal situation in New York City" and recommending the repeal of the 1885 act, had stated that "we will * * * not want to cancel * * * for 20 years. * * * I do not think there is any chance in the 20 years of our wanting to abandon" leased premises there (R. 36). By letter the Postmaster General then sent a draft of the proposed repeal to the Senate and House committees *in the exact form and language in which Congress later enacted it* (R. 38). In this same letter he stated that the repeal was devised to make it "optional with the Postmaster General as to whether or not such a [cancellation] provision shall be inserted in the leases" (R. 38, 39-40). It was only after all this had taken place that the lease here involved was actually executed on March 10, 1922 (R. 9, 16, 39, 42).

Although it was provided in the standard printed form of Post Office lease, was regarded as a mandatory provision of all leases in the practice of the Post Office, and was stated as a requisite lease term in an opinion of the Assistant Attorney General for the Post Office Department (R. 17, 40-

42; 5 Op. A. A. G., P. O. D. 539), *the customary cancellation provision drawn from the 1885 act was deliberately omitted from the typewritten and specially prepared lease here in question* (R. 41). At the time of the execution of the lease, it was of course as certain as it could be that the 1885 act would be repealed (R. 42-43). Not only did petitioner undoubtedly know of the pending repeal, but the Post Office knew it; the Post Office executives had a duty to bargain with the repeal in mind; and, if the lessors would not make rent allowances for the pending repeal, the Post Office officials could (and it was their duty to) merely postpone the execution of the lease for the short while until the imminent repeal became law. To assume, as does the majority below, that the pending repeal of the 1885 act was not taken into account in negotiating the lease here in question is to ignore the realities of the situation, to disregard the significant omission of the cancellation clause from the lease, and to assume that the postal officers, despite their extensive testimony to the contrary before legislative committees (R. 36-37), were callous of duty and were not attempting to secure the lowest possible rental rates. *That postal authorities and other parties actually contracted with the impending repeal in mind, the Court of Claims itself has previously recognized in allowing recovery in another case of a lease entered during the same period. Twin Cities Properties, Inc.* v. *United States,* 87 C. Cls. 531 and 90 C. Cls. 119.

Shortly after the execution of the lease here in question, the repeal of the 1885 act became effective (R. 15; 42 Stat. 652, 656, June 19, 1922). The lease had no cancellation clause in its text and to read in such a clause, as the majority judges below now seek to do by legal fiction, manifestly creates a result that is highly unjust and entirely beyond the intention of the parties at the time the lease

was executed. Moreover, the practice regarding Post Office leases illustrates why it was that no saving clause was recommended or necessary in the 1922 repeal of the 1885 act—since the Post Office customarily wrote cancellation provisions into its leases, it had no need of a statutory right of cancellation and hence no reason to ask the inclusion of a statutory saving clause as to prior contracts; and in the present contract of lease the postal authorities, as they had said they might do in appropriate cases (R. 36-40), deliberately omitted the cancellation provision, obviously because they had negotiated to do so and had secured a benefit in the way of reduced rentals thereby.

The majority below, however, ignores all of these crucial factors and, in so doing, sets at naught the intention of Congress and the purposes of the parties in entering the specially prepared form of lease here involved.

CONCLUSION

From both the legislative history and the unqualified language of the repeal statute, it is abundantly clear that Congress contemplated and intended an entire and sweeping change of policy, and did so on the highest grounds of public interest. The change marked a distinct advance and there is no reason why it should be whittled, impaired, or thwarted by judicial interpretation. The decision below departs from the settled law of statutory construction in fundamental particulars and disrupts the law of public contracts. It does, moreover, a manifest injustice to petitioner and others who enter contracts in reliance upon settled law. It subjects petitioner to a burden entirely beyond the intention of the parties when they negotiated and executed the lease here in question. It ignores the intention of Congress and the purposes and practices of the postal authori-

ties at the time, all of which are fully set forth in the legislative history of the very repealing act here involved.

Respectfully submitted,

HOMER CUMMINGS,
RAYMOND E. HACKETT,
Attorneys for Petitioner.

July, 1942

In the Supreme Court of the United States

OCTOBER TERM, 1942

Nos. 211–212

EASTERN BUILDING CORPORATION, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR WRITS OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court below and the dissenting opinion (R. 19–52)[1] are not yet reported.

[1] The petition seeks review of two judgments of the Court of Claims. Both were rendered in actions for recovery of rent due under the same lease; and the suit involved in No. 212 sought recovery for a period of time immediately following the period involved in No. 211. The substantive facts and legal questions in both cases are identical and the judgment and opinion in No. 211 are dispositive of No. 212. Accordingly, references in this brief will be made to the record in No. 211, except where otherwise indicated.

16). On December 17, 1920, the Post Office Department in a letter to petitioner pointed out that only the three months' notice cancellation clause would be eliminated (R. 17).

In 1921, petitioner constructed a building on its premises primarily adapted for post-office facilities, and on March 1, 1922, a lease of the property for twenty years from October 1, 1921, was entered into between petitioner and the United States at an agreed rental of $400,000 for the first year and $300,000 for each succeeding year, payable in quarterly installments (R. 14–15). The lease contained no express provisions as to cancellation except on certain contingencies not here material (R. 15). Pursuant to the provisions of the lease the United States entered into possession of the leased premises and continued to occupy them and to pay rent therefor up to and including August 31, 1939 (R. 15–16).

On May 27, 1939, the Acting Postmaster General advised petitioner by letter that the Department elected to cancel the contract as of August 31, 1939, because it was possible to remove all the postal activities to a Government-owned building (R. 16). Petitioner declined to accept the cancellation and advised the Postmaster General that it expected the Government to pay the rent for the remainder of the term in accordance with the contract (R. 17–18). On August 31, 1939, the United States

moved its post office facilities to a Government-owned building which was then completed and available for that purpose (R. 18). Since that date the United States has not occupied nor paid any rental for the premises (R. 18).

Petitioner brought two actions in the Court of Claims, the first (No. 211) seeking the recovery of $250,000 as rent due July 1, 1940 (R. 2–3), and the second seeking the recovery of $75,000 as rent due October 1, 1940 (No. 212, R. 2). The United States defended on the grounds (1) that the cancellation provision of the Act of March 3, 1885, had become an obligation of the contract which was unaffected by subsequent repeal of that provision, and (2) that Congress had failed to appropriate money for payment of the rental on the premises in question.[2] The court below, in an opinion by Chief Justice Whaley and a concurring opinion by Judge Madden, dismissed the petitions on the first of the two grounds of defense urged by the United States. The second defense was not passed upon. Judge

[2] The court below also found that in preparing its estimates for the fiscal year ended June 30, 1940, the Post Office Department took into consideration the fact that a federal building should be ready for occupancy in New York City into which the activities carried on in the leased premises would be transferred, and accordingly included in its estimates rent for the premises for only the first six months of that fiscal year. The total estimates for rent for the various post offices, submitted by the Post Office Department, were reduced $75,000 by the Bureau of the Budget and an additional $150,000 by Congress. (R. 16.)

Littleton filed a dissenting opinion in which Judge Whitaker concurred.

ARGUMENT

Petitioner apparently does not seriously controvert the ruling of the court below that the cancellation provision of the Act of March 3, 1885, which authorized the termination of a lease whenever a post office could be moved into a Government building and was concededly in effect at the date of the execution of the lease (Pet. 3), became in law a part of the contract and would thus, in the absence of its repeal, have supported the Government's cancellation of the lease as of August 31, 1939 (cf. Pet. 17). Petitioner contends, however, that by reason of the Act of June 19, 1922, which repealed the cancellation provision of the Act of March 3, 1885, the situation became the same as if the law of 1885 had never existed, so that if the cancellation clause was written into the contract by the 1885 statute, it was expunged by the repeal of the statute. It consequently contends that the court below erred in failing to give such effect to the Act of June 19, 1922. We submit that this contention is without merit.

1. It is established doctrine that "laws which subsist at the time and place of the making of a contract * * * enter into and form a part of it, as fully as if they had been expressly referred to or incorporated in its terms." *Farmers and Mer-*

chants Bank v. *Federal Reserve Bank,* 262 U. S. 649, 660; *Russell Co.* v. *United States,* 261 U. S. 514, 524; *Northern Pacific Ry.* v. *Wall,* 241 U. S. 87, 91–92; *Rees* v. *City of Watertown,* 19 Wall. 107, 121; *National Surety Corp.* v. *Wunderlich,* 111 F. (2d) 622 (C. C. A. 8); *Compagnie Generale Translantique* v. *American Tobacco Co.,* 31 F. (2d) 663, 666 (C. C. A. 2), certiorari denied, 280 U. S. 555. This principle is explicit or necessarily implicit in every decision of this Court condemning, as an invalid impairment of the obligation of contract under Section 10 of Article I of the Constitution, the retroactive repeal of a state statute which was in effect at the time the contract in question was entered into. *Coombes* v. *Getz,* 285 U. S. 434; *Edwards* v. *Kearzey,* 96 U. S. 595, 601; *Walker* v. *Whitehead,* 16 Wall. 314, 317; *Von Hoffman* v. *City of Quincy,* 4 Wall. 535, 550–554; cf. *Ochiltree* v. *Railroad Company,* 21 Wall. 249, 252–253; *Hawthorne* v. *Calef,* 2 Wall. 10, 21–22. Therefore, the cancellation provision of the Act of 1885 was as much a part of the contract entered into between petitioner and the United States as if the terms of that provision had been fully set out in the lease. Whether the parties to the lease intended that the cancellation clause of the 1885 Act be included is immaterial, for the rule which makes pertinent laws a part of all contracts is independent of the contractors' intention (*Whitfield* v. *Aetna Life Insurance Co.,* 205 U. S. 489, 496; *Modern Brother-*

hood of America v. *Lock,* 22 Colo. App. 409; and cases cited, *supra;* see 2 Restatement, Contracts (1932) sec. 580 (2) (e); *cf.* 3 Williston, *Contracts* (rev. ed.) sec. 615), except of course where the law itself requires an expression of assent to its applicability.[3] There was plainly no such requirement under the 1885 Act.

2. Petitioner, while not specifically challenging the fact that the cancellation clause in the Act of 1885 was a part of the contract, contends that its repeal in 1922 had the effect of eliminating it therefrom and urges that the 1922 Act, as a repeal statute, is entitled to retrospective effect, in sharp contradistinction to the rule as to general legislation, which is customarily accorded only prospective application. But petitioner overlooks the fact that the prospective operation generally given to substantive laws and the retroactive effect frequently given to repeal statutes are merely the

[3] The record discloses an understanding, prior to execution of the formal lease, that the contract would be subject to the cancellation provision of the 1885 Act. Its omission from the lease is not explained. If, as petitioner contends (Pet. 21–23), it was not the intent of the Postmaster General to make the cancellation clause of the 1885 Act a part of the contract, it is sufficient to observe that the statute created an unconditional infirmity in all post office leases, *i. e.* their cancellability on a specified contingency, and the Postmaster General was obviously without any authority to bind the United States in a manner inconsistent with the express directive of Congress. There is nothing in the case, however, to indicate that the Postmaster General had any such intent or that he did not believe that the 1885 statute automatically became a part of the contract; the record clearly displays a belief on his part to the contrary. (R. 16–17.)

result of deriving such a legislative intention from the character of the law or from the particular circumstances surrounding it.

As was pointed out in the concurring opinion of Judge Madden (R. 22–23), repeals of penal, usury and procedural statutes are often held to operate retrospectively because the character of the statutes and the subject matter which they affect justify the imputation of a legislative intent that they operate retrospectively as well as prospectively, in the absence of a saving clause. Repeal legislation may also operate prospectively only, not because of a saving clause, but because its nature and subject matter warrant the assumption that the lawmakers would have intended that it be so applied. For example, this Court has had no difficulty in finding a controlling legislative intent that a repeal statute without any saving clause is not to operate retrospectively where the law which has been repealed has, under the principle discussed above, become part of the obligations of the contract. *United States* v. *Heth,* 3 Cranch 399, 413; *Steamship Company* v. *Joliffe,* 2 Wall. 450, 457; *Twenty Per Cent. Cases,* 20 Wall. 179, 187; *United States* v. *Burr,* 159 U. S. 78, 82–83; *Knights Templars' Indemnity Co.* v. *Jarman,* 187 U. S. 197, 204–205. There can be little doubt that the repeal of a statute authorizing cancellation of a contract would not be construed to operate retroactively if the lessee as well as the lessor were private persons, nor

even, as Judge Madden observed (R. 25), in the present situation if the repeal prejudiced rather than favored the private lessor. There is no reason, therefore, why such a repeal should be construed to operate retroactively when it renounces a privilege which the Government previously enjoyed. While the United States might relinquish through appropriate legislation any right which it had obtained by statute without encountering constitutional difficulties, a voluntary relinquishment of the Government's rights under outstanding contracts is not lightly to be presumed, since statutes divesting public rights are entitled to a strict construction. *Wisconsin Central Railroad* v. *United States,* 164 U. S. 190, 202.

In any case, the legislative history of the repeal Act of 1922 clearly requires its prospective application only. The sole purpose of the repealing statute was to enable the Postmaster General to obtain more favorable terms as to yearly rental in the future negotiation of long term leases. It was repeatedly insisted in the proceedings before Congress and its Committees that this could best be accomplished by making the termination of a lease upon removal from a leased post office to a Government-owned building discretionary rather than mandatory, leaving the question of the insertion of an appropriate cancellation clause in a contract to the judgment of the Postmaster General. Sen. Rep. No. 556, 67th Cong., 2d Sess.; H. R. No.

839, 67th Cong., 2d Sess.; 62 Cong. Rec. 4932, 6911. Here the contract was negotiated a year and a half before, and executed several months before, the enactment of the repeal statute, so that petitioner could only have contracted upon the basis of the automatic cancellation privilege then made mandatory by the 1885 statute. There is nothing to indicate that the Congress had any intent whatsoever to bestow a mere gratuity upon persons situated as was petitioner, which had negotiated its contract and had presumably financed the construction of the leased premises at a time when the 1885 Act automatically applied (see R. 35–36).

For these reasons, the court below properly refused to attribute to Congress an intention that the repealing act of 1922 should apply retrospectively. *Cf. United States* v. *Dickerson,* 310 U. S. 554, 561–562.

3. The question presented involves no conflict and is not one of general importance. The repealing Act of 1922 was passed more than twenty years ago, at a time when the Postmaster General had no authority to enter into a lease for a period in excess of twenty years. Accordingly, any contract of lease into which the terms of the 1885 statute could have entered must since have expired, or, if the lease has been terminated by the Post Office Department, that termination must have occurred some time ago. So far as we are aware, no claims arising out of the termination of a contract of lease

because of removal of the postal enterprise to Government-owned property are pending other than petitioner's. A decision in the instant case would in all likelihood be determinative of the present controversy only, and, in any event, would determine no more than the intention of Congress in passing the repeal statute of 1922.

CONCLUSION

The decision below was correct and the question is not one of general importance. There is no conflict of decisions. We respectfully submit that the petition for a writ of certiorari should be denied.

CHARLES FAHY,
Solicitor General.

FRANCIS M. SHEA,
Assistant Attorney General.

DAVID L. KREEGER,
PAUL A. SWEENEY,
WALTER J. CUMMINGS, JR.,
Attorneys.

AUGUST 1942.

U. S. GOVERNMENT PRINTING OFFICE: 1942

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Supreme Court of the United States

OCTOBER TERM, 1942.

Nos. 211-212.

EASTERN BUILDING CORPORATION,
Petitioner,

vs.

THE UNITED STATES.

BRIEF ON BEHALF OF COMMITTEE FOR HOLDERS OF EASTERN BUILDING CORPORATION BONDS, *AMICUS CURIAE.*

At the time of the execution of the lease involved in this action, the premises in question were subject to a trust mortgage executed to secure an issue of First Mortgage Bonds in the sum of $1,600,000, and the Trustee under the Mortgage Indenture was a party to the lease. The building in question was a specialty building, *i. e.*, erected for the sole purpose of housing a United States Post Office and nothing else, and the funds for the acquisition of the land and the erection of the building were obtained principally from the proceeds of the sale to the public of the said issue of First Mortgage Bonds. It appears from the dissenting opinion in the Court below that the execution of the lease was delayed because of the difficulty which the Eastern Building Corporation had in financing the proposition. Approximately $922,000 principal amount of said bonds are now outstanding. They were purchased by investors in the belief that the premises subject to the Mortgage had been leased

to the Government under a valid and binding twenty year lease. Due to the failure of the Postmaster General to pay the rent the said issue is now in default and the investors have suffered heavy losses.

It seems an anomalous situation that the Government of the United States, which, through its legislative branch, has in recent years enacted important legislation for the protection of investors, legislation which is now being actively enforced by Government officials, should at the same time take the position through other departments that a twenty year lease, on the strength of the existence of which a substantial bond issue was offered and sold to the public, is in effect cancellable by the Government at will.

The decision of the Court of Claims works great injustice to this substantial body of innocent investors and the determination of the case is of importance to them. For this reason and for the reasons urged by the petitioner, it is respectfully requested that this Court grant the writ herein sought.

Respectfully submitted,

LIVINGSTON PLATT,
Attorney for Committee for Holders of Eastern Building Corporation Bonds, Amicus Curiae.